IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1547 OF 2006

IN

SUIT NO.603 OF 1981

Bai Khatija Yusuf Bastawala & Ors. ...Plaintiffs

Versus

Bai Fatimabai Abdeali Dahodwala ...Defendant

.....

Mr.A.S.Chandurwala i/b M/s.Desai & Diwanji for Plaintiffs.

Mr.A.N.Maniyar for Defendant.

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CORAM: A.M.KHANWILKAR, J.

APRIL 27, 2007.

P.C.

1. Heard Counsel for the parties. Perused the relevant pleadings and documents on record in Suit No.603 of 1981 and Suit No.709 of 1984. Preliminary decree has been passed by this Court on 5th/6th August 2004. The operative part of the order (Para 82) which is relevant for our purpose reads thus :

"i) Decree in terms of prayers (a) to (c) and (i). The preliminary decree shall incorporate and be drawn up in accordance with the provisions of Order XXI Rule 13 of the Code of Civil Procedure.

ii) It is declared that the branch of original Defendant No.1 is entitled to a 1/8th share in the estate of the deceased.

iii) It is declared that the branches of the original Plaintiffs Nos.2 and 3 and of original Defendant No.2 are entitled to equal share in the remaining estate of the deceased.

iv) It is declared that "Karim Building" referred to in paragraph 4 of the plaint forms part of the estate of the deceased.

v) It is declared that all the assets including the goodwill of the business that the deceased carried on in the name and style of M/s.Kurbanhusein Tyaballi including the tenancy rights in the aid premises viz. shop No.246 Janjikar Street, Crawford Market, (near Jumma Masjid) Mumbai form part of the assets of the deceased.

vi) The Commissioner or taking accounts shall proceed to ascertain the estate of the deceased and quantify the shares of the branches of the parties as mentioned above.

vii) The Court Receiver of this Court has been appointed as Receiver of the estate of the deceased. The Receiver shall sell the estate of the deceased by public auction. Liberty to the parties to bid.

viii) Liberty to the Court Receiver and to the parties to apply for directions for payment of the dues of the estate if any before the final decree.

ix) After all properties of the estate of the deceased have been sold, the Receiver and the Commissioner for taking accounts shall submit a report ascertaining the shares of the aforesaid branches. The report shall take into account all amounts that may be found due to the estate including from the parties/original parties to the two suits.

x) The costs of the parties shall be decided at the stage of hearing/final decree.

xi) Liberty to the parties to apply."

2. The Plaintiff Nos. 2 and 3 have approached this Court by way of present Chamber Summons requesting for a direction against the Court Receiver to disburse the amount lying in the Suit account with it in the proportionate share of the parties specified in the preliminary decree. This prayer is opposed by Defendant No.2 on two counts. In the first place, it is contended that the Defendant No.2 has taken up the matter in Appeal against the preliminary decree, for which reason, this Court has no authority to pass the order as is pressed by the Plaintiffs. It is next contended that going by the preliminary decree already passed, it is a self operative decree which

provides for Commissioner for Taking Accounts to ascertain the estate of the deceased and quantify the shares of the branches of the parties and thereafter, the Court Receiver is obliged to submit report to the Court. It is only thereafter, the question of disbursal of amount will arise.

3. Having considered the rival submissions and going through the pleadings and in particular the preliminary decree, I find no merits in the two objections taken on behalf of Defendant No.2. The fact that Defendant No.2 has filed appeal, by itself, does not result in stay of further proceedings before the Single Judge of this Court. The Defendant No.2 was given sufficient time to approach the Appellate Court for appropriate interim order, as may be advised. Inspite of sufficient opportunity, the Defendant No.2 has not been able to get any interim protection from the Appellate Court. In that sense, the question to be addressed in the present Chamber Summons is: whether the Plaintiffs are entitled for enforcement of the preliminary decree which, in substance, is the relief claimed in the present Chamber Summons.

4. The argument of the Defendant No.2 that the preliminary decree is a self operative decree and until the shares of branches are not determined by the Commissioner for Taking Accounts, this Court cannot proceed in the matter, also will have to be stated to be rejected. This argument clearly overlooks the earlier part of the decree which determines the extent of share of the respective branch. Insofar as Defendant No.1 is concerned, clause (ii) of the preliminary decree provides for 1/8th share in the estate of the deceased to the said Defendant. It is not in dispute that besides Defendant No.1, the only other branches who will succeed to the estate of the deceased are Plaintiff Nos.2 and 3 and Defendant No.2. In that sense, the remaining branches of deceased namely Plaintiff Nos.2 and 3 and Defendant No.2 are left with balance 7/8th share in the estate of the deceased. The preliminary decree clearly spells out this position. If that is the nature of preliminary decree, it is unfathomable as to how the Commissioner for Taking Accounts can be given the option to ascertain the shares of the branches of

the deceased though it is so mentioned in Clause (vi) of the preliminary decree. The said direction will have to be understood in the context of the earlier arrangement provided in the preliminary decree in Clauses (ii) and (iii) thereof, as is referred to earlier.

5. Thus understood, I have no hesitation in accepting the argument of Plaintiffs 2 and 3 that the funds which are lying in the suit account with the Court Receiver should be disbursed between the Plaintiffs 1 and 2 and Defendants 1 and 2 in the manner provided in Clauses (ii) and (iii) of Paragraph 82 of the order which purports to pass the preliminary decree. Insofar as Plaintiffs 2 and 3 and Defendant No.2 are concerned, they will get 7/8th share in the estate of the deceased together. The said amount will have to be distributed in equal shares to Plaintiff No.1, Plaintiff No.2 and Defendant No.2 respectively.

6. I am in agreement with the submission of the Plaintiffs that there is no propriety in allowing the funds to remain with the Court

Receiver lying idle. The parties should be in a position to enjoy the benefits of the preliminary decree unless the same was to be stayed or set-aside by the superior Court.

7. Accordingly, Chamber Summons is made partly absolute by directing the Court Receiver to distribute only 7/8th share of the amounts lying with the Court Receiver stated to be the estate of the deceased between Plaintiffs 2 and 3 and Defendant No.2 in equal proportion in terms of clause (iii) of Paragraph 82 of the order purporting to pass preliminary decree. The amount representing 1/8th share of original Defendant No.1 who is stated to be dead, will have to be set-apart, to be distributed at the appropriate stage of the proceedings.

8. The argument of the Plaintiffs that the share of Defendant No.1 also be disbursed to the Plaintiffs 2 and 3 and Defendant No.2 as there are no other heirs of deceased Defendant No.1 except the Plaintiffs 2 and 3 and Defendant No.2, will have to be considered at the appropriate stage and

even that amount may be disbursed only after finding in that behalf is recorded in case of contest between the parties on that issue.

A.M.KHANWILKAR, J.